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December 2, 2003

VIA HAND DELIVERY

Walter Thomas, Secretary
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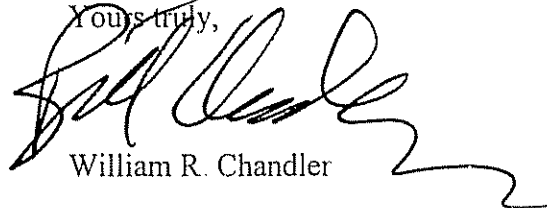
RE: *Petition for a Declaratory Order Regarding Classification of IP Telephony Service*
Docket Number 29016

Dear Mr. Thomas:

Enclosed for filing with the Alabama Public Service Commission are the original and ten copies of the Reply Comments of the Alabama Telecommunications Association.

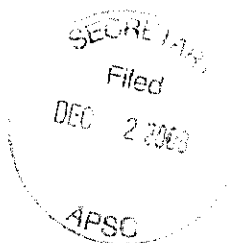
With best regards for the holidays, I remain

Yours truly,



William R. Chandler

WRC:ksv
Enclosures



**BEFORE
THE ALABAMA PUBLIC SERVICE COMMISSION**

**IN RE: Petition For A Declaratory
Order Regarding Classification of IP
Telephony Service**

DOCKET 29016

**REPLY COMMENTS OF
THE ALABAMA CABLE TELECOMMUNICATIONS ASSOCIATION**

The Alabama Cable Telecommunications Association ("ACTA") respectfully submits these reply comments in response to the Alabama Public Service Commission's ("APSC" or "Commission") August 29, 2003 *Order* in the above-captioned proceeding.

1. The Commission Should Not Regulate VoIP Offerings.

The parties to some extent may disagree on whether the Commission has jurisdiction to regulate providers of Voice over Internet Protocol ("VoIP") services. Significantly, however, all commenters except one concur with ACTA's view that the Commission should not actively regulate VoIP arrangements at this time. The majority of commenters agree that the Commission does not have jurisdiction to regulate VoIP services, and urge the Commission, should it find otherwise, to nevertheless refrain from regulating at least until the Federal Communications Commission ("FCC") addresses the regulatory status of VoIP.¹

¹ *Comments of BellSouth Telecommunications, Inc.*, In Re Petition for a Declaratory Order Regarding Classification of IP Telephony Service, Docket No. 29016 (filed October 31, 2003) at 4 (stating that "[i]n light of the FCC's previously stated intentions to initiate a VoIP proceeding, the statements of FCC Commissioners on the national importance of the topic, and the weight of the record thus far in the FCC's Vonage proceeding, BellSouth believes that it would be a mistake at this early stage in the development of VoIP technologies and services for this (note continued)...

In fact, the largest incumbent local exchange carrier (“ILEC”) in Alabama, BellSouth, urges that “it would be a mistake” for the APSC to issue a ruling at this time addressing the regulatory status of VoIP,² and the Attorney General of the State of

... (note continued)

Commission and other state commissions to undertake what would amount to duplicative state proceedings that could, in turn, result in a patchwork of inconsistent state rules that interfere with the rapid evolution of these promising new consumer services and the development of an appropriate national regulatory framework for dealing with them.”); *Comments of the Attorney General, Inc.*, In Re Petition for a Declaratory Order Regarding Classification of IP Telephony Service, Docket No. 29016 (filed October 31, 2003) at 2 (arguing that “[t]he Petitioner’s request for a declaratory ruling as to [the questions surrounding the regulatory status of VoIP] . . . may be premature and may be best served after federal and state regulators have had an opportunity to more properly determine the appropriate forum, nature, and extent of regulation necessary for internet protocol-based services.”); *Initial Comments of AT&T*, In Re Petition for a Declaratory Order Regarding Classification of IP Telephony Service, Docket No. 29016 (filed October 31, 2003) at 1 (stating that the Commission “should refrain from asserting [any jurisdiction it may have] . . . and regulating VoIP services at this time”); *Joint Comments of ICG Telecom Group, Inc and Level 3 Communications, LLC*, In Re Petition for a Declaratory Order Regarding Classification of IP Telephony Service, Docket No. 29016 (filed October 31, 2003) at 4 (arguing that “any broad policy statements or rules attempting to impose state regulation on VoIP services would be necessarily overbroad and preempted” by federal law and that “[a]t a minimum, Joint Commenters recommend that this Commission delay this proceeding until presented with a specific factual pattern.”); *Comments of ITC^DeltaCom Communications Inc.*, In Re Petition for a Declaratory Order Regarding Classification of IP Telephony Service, Docket No. 29016 (filed October 31, 2003) at 1-3 (recommending that “the Commission defer making any immediate decisions regarding the regulation of VoIP” due to the fact that several VoIP-related proceedings are currently pending before the FCC and the recent decision of a federal district court granting an injunction against the Minnesota Public Utilities Commission from imposing on VoIP provider laws that regulate telephone companies); *Comments of MCI*, In Re Petition for a Declaratory Order Regarding Classification of IP Telephony Service, Docket No. 29016 (filed October 31, 2003) at 4 (encouraging “the Commission to refrain from adopting specific regulatory rules at least until VoIP-related matters are addressed by the FCC”); *Comments of Net2Phone, Inc.*, In Re Petition for a Declaratory Order Regarding Classification of IP Telephony Service, Docket No. 29016 (filed October 31, 2003) at 1 (arguing that VOIP services do not fall within the Commission’s jurisdiction and “significant public reasons exist for the Commission to refrain from regulating VOIP providers at this time.”); *Comments of the Voice on the Net Coalition*, In Re Petition for a Declaratory Order Regarding Classification of IP Telephony Service, Docket No. 29016 (filed October 30, 2003) at 1 (urging the Commission “to refrain from taking any action to regulate VoIP.”); *Comments of Vonage Holdings Corp.*, In Re Petition for a Declaratory Order Regarding Classification of IP Telephony Service, Docket No. 29016 (filed October 31, 2003) at 22 (recommending that “the Commission closely and carefully examine the provisions of VoIP by the specific provider on a case-by-case basis.”).

² Comments of BellSouth Telecommunications, Inc., at 4.

Alabama submits that issuing a declaratory ruling on VoIP may be “premature.”³ ACTA again urges the Commission to forbear from applying whatever regulatory authority it may have over VoIP in order to let this nascent market develop, for the benefit of consumers and a competitive communications environment in Alabama. The appropriate degree of regulation, if any, can and should be determined only after the various VoIP technologies and offerings have had a chance to evolve in response to market demands and only after the FCC weighs in on the issue—which it can be expected to do in the very near future.⁴

The principal exception to the general deregulatory tenor of the initial comments filed in this proceeding is the filing made by the petitioning ILECs themselves. These ILECs urge the Commission to impose on VoIP providers' state laws and regulations conceived and applied to services provided by telecommunications common carriers.⁵ For the reasons set forth in ACTA's initial comments, the Commission should reject this suggestion. Different VoIP arrangements have different technical characteristics that will certainly affect (in different ways) the ability of the particular arrangement to conform with a set of generic requirements designed for the traditional telephone industry, such as 911 service rules. Industry-devised standards—brought about in response to consumer

³ Comments of the Attorney General, at 2.

⁴ The FCC is expected to release a notice of proposed rulemaking shortly after the conclusion of its December 1, 2003 VoIP workshop. Josh Long, *FCC to Open Proceeding on VoIP Regulation*, Xchange, <http://www.xchangemag.com/hotnews/3bh7135218.html> (posted Nov. 7, 2003). See also *FCC Announces Agenda for the Voice Over IP Forum to be Held on December 1, 2003*, Public Notice, DA 03-3777 (FCC rel. Nov. 24, 2003).

⁵ *Comments of Petitioning ILECs*, In Re Petition for a Declaratory Order Regarding Classification of IP Telephony Service, Docket No. 29016 (filed Oct. 31, 2003) at 1 (arguing that the Commission “has always interpreted its enabling statute as providing it with the obligation to regulate” any service involving a telephone, including VoIP, without citing any APSC orders to support its assertion.).

demand—will result in standards that are technologically feasible, as well as technology- and market-appropriate. For example, although ACTA is not familiar with all VoIP arrangements, two of the leading VoIP providers have made the business judgment that it would be in their interests and technically feasible for them to offer 911 service. Vonage provides standard 911 services free of charge to its VoIP customers. *See Vonage's website* at http://www.vonage.com/features_911.php. Earthlink plans to deploy “short form” emergency services in the near future. *See Earthlink's website* at <http://www.unlimitedvoice.com/faq.php#q2>. Both companies have made the business decision to deploy 911 services voluntarily and without regulatory compulsion and have been able to adopt solutions that are appropriate to their particular offerings.

2. Intercarrier Compensation and Access Charges

The only commenter to agree with the Petitioners' argument that VoIP traffic should be subject to access charges is BellSouth, although BellSouth contends that it would be inappropriate for the APSC to make any determinations with respect to intercarrier compensation at this time⁶ and, in fact, BellSouth favors bill-and-keep arrangements instead of access charges.⁷ In short, no commenter (except the Petitioners) believes that it would be prudent for the APSC to expose VoIP traffic to access charges,

⁶ *Comments of BellSouth Telecommunications, Inc.* at 4-5 (arguing that that states should refrain from making any regulatory determinations, including determinations regarding intercarrier compensation, until the FCC has concluded its own proceedings on these issues).

⁷ *Comments [of BellSouth Corporation]*, In Re Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211 (filed with the FCC on Oct. 27, 2003) at 6 (filed as an attachment to BellSouth's comments in this proceeding and arguing as a default position that access charges should apply to VoIP traffic if the FCC does not move to a bill and keep intercarrier compensation mechanism). In the Vonage proceeding, the FCC is considering a petition filed by VoIP provider Vonage requesting that the FCC find that the September 11, 2003 order of the Minnesota Public Utilities Commission imposing state laws governing telephone service on Vonage's VoIP service is preempted.

particularly since this very issue is currently pending before the FCC.⁸ Even after the conclusion of that proceeding, the question of which access charges or other payments properly apply to VoIP offerings should be based on the specific technical characteristics of particular offerings—in other words, determined on a case-by-case basis.

Several factors support the above conclusion. First, at the federal level, VoIP providers have not been found to be telecommunications carriers, and therefore, it would be anomalous for the Commission to prescribe that a VoIP provider be required by law to pay intrastate access charges, while the provider has no interstate access charge liability. As several commenters discussed in their initial comments, it may prove very difficult if not impossible from a technical standpoint for many VoIP providers to actually separate out the intrastate portion of their traffic,⁹ particularly because most of their traffic is estimated to be interstate.¹⁰

Second, as just noted the initial comments filed in this proceeding show that there are a wide variety of services and arrangements that fall under the “VoIP” rubric. Even if a case could conceivably be made that some particular type of VoIP arrangement should be subject to traditional access charges, that conclusion would not necessarily apply to other types of VoIP arrangements. To encumber all VoIP offerings that are arguably akin to intrastate long distance with an obligation to pay traditional intrastate access charges

⁸ See Wireline Competition Bureau Seeks Comment on AT&T’s Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt from Access Charges, Public Notice, 17 FCC Rcd 23556 (WCB 2002). Reply comments in this proceeding are due January 7, 2003.

⁹ See *Joint Comments of ICG Telecom Group, Inc. and Level 3 Communications, LLC*, at 20; *Comments of Vonage Holdings Corp.*, at 9-10 (stating that the Internet-based nature of Vonage’s service “makes it impossible to distinguish intrastate from interstate communications.”).

¹⁰ See, e.g., *Comments of the Attorney General*, In Re Petition for a Declaratory Order Regarding Classification of IP Telephony Service, Docket No. 29016 (filed Oct. 31, 2003) at 2 (stating that VoIP services “tend to be largely interstate by nature.”).

would paint with too broad a brush. Indeed, even if the Commission were to conclude that some particular VoIP offering has the qualities of a telecommunications service, the Commission should still refrain from applying traditional access charges to the service. Traditional access charges are not based on cost, but rather contain subsidies that would inevitably distort the deployment and development of new and useful services such as VoIP.¹¹

The ILEC Petitioners acknowledge that the reason they want VoIP providers to pay access charges is to extract legacy subsidy payment from these new services. They fear that if VoIP providers do not pay these high rates, eventually the funds supposedly used today to keep basic rates low and expand rural broadband deployment will be placed in jeopardy.¹² ACTA urges the Commission to view the Petitioners' claims with skepticism. While the Petitioners point to a very high estimate of the total amount of voice traffic that uses the Internet (10%),¹³ most estimates are that VoIP calls represent a very small fraction of the total communications traffic in the United States.¹⁴ The portion of Alabama VoIP traffic that is intrastate would be a tiny fraction of this 1-5% total. Thus, there is no reason to think that the volume of intrastate VoIP traffic will have a material impact on ILEC access charge revenues (or CLEC access charge revenues, for that matter) any time soon.

¹¹ See *Comments of MCI*, at 10 (arguing that "the current patchwork of intercarrier compensation rules should be revamped so as to eliminate archaic schemes designed to keep ILECs 'whole.'").

¹² *Comments of Petitioning ILECs*, at 6.

¹³ *Id.* at 2.

¹⁴ *Comments of Voice on the Net Coalition*, at 12 n.26 (stating that AT&T estimates that "IP telephony" services represent no more than 1-5% of all interexchange calling, citing AT&T recent petition to the FCC) (citation omitted).

Moreover, Petitioners assume that the existing levels of intrastate access charge revenues are appropriate.¹⁵ It is possible, however, that the earnings of the affected companies would not be lowered below a reasonable level (for ratemaking purposes) even if access charge revenues were to decline significantly. In the absence of record evidence that a revenue requirement increase would be warranted by a decline in access charge revenues (whether caused by VoIP or not), there is no reason to presume that any useful regulatory purpose is served by subjecting VoIP arrangements to legacy (often very high) intrastate access charges.¹⁶

In this regard, the pro-competitive goals of the Telecommunications Act of 1996 require that implicit subsidies be removed from interstate and intrastate pricing structures. As the federal courts have observed:

In addition to fostering competition in the local telephone service market, the 1996 Act had another key goal of continuing the provision of affordable universal service to all Americans. Traditionally, the phone bills of poor and rural customers have been implicitly subsidized by rate manipulation. High-volume long-distance callers and urban residents pay artificially higher phone bills to subsidize and support universal service for others. Congress recognized that these implicit subsidies could not continue under the market-based regime ushered in by the 1996 Act. In a competitive market, a carrier that subsidizes rural or poor customers by charging below-cost rates while billing above-cost rates to urban customers will be undercut by a competitor offering at-cost rates to urban end-users. Congress wanted to continue subsidizing universal service, but in a way more consistent with the market-oriented reforms. The 1996 Act thus required that the implicit subsidy system of rate manipulation be replaced with explicit subsidies for universal service.

¹⁵ *Comments of Petitioning ILECs*, at 6 (arguing that “the APSC must either maintain the existing inter-carrier compensation system or replace it with another funding mechanism”).

¹⁶ Support for this cautious approach towards traditional access charges also comes from the “Nascent Services Doctrine,” which provides that regulators should exercise restraint when faced with new technologies and services. *See, e.g., The Nascent Services Doctrine*, Remarks of FCC Commissioner Kathleen Q. Abernathy before the Federal Communications Bar Association, New York Chapter (July 11, 2002), available at <http://www.fcc.gov/Speeches/Abernathy/2002/spkqa217.html>.

Texas Office of Public Utility Counsel v. FCC, 265 F.3d 313, 318 (5th Cir. 2001). To the extent that VoIP places pressure on the affected carriers to begin to remove implicit subsidies from their rates, that is a good thing—something the Commission should encourage, not something it should suppress by imposing legacy subsidy obligations on this new service.

Finally, there is something slightly anomalous, to say the least, in the prospect that the Petitioners are using or propose to use *intrastate* access charge revenues to support the deployment of broadband services.¹⁷ While the deployment of broadband is certainly a worthy goal, the primary use of residential broadband connectivity today is to connect to the Internet — an activity that the FCC has declared to be fundamentally interstate in nature. The Petitioners, apparently, propose to turn the traditional industry subsidy flow, from interstate to intrastate operations, on its head and use intrastate revenues to support the investments needed to offer jurisdictionally interstate services. In this regard as well, at least at present broadband Internet access is not a service funded under the federal universal service scheme. It would therefore seem to violate the requirements of the 1996 Act that universal service support flows be explicit.¹⁸

¹⁷ *Comments of Petitioning ILECs*, In Re Petition for a Declaratory Order Regarding Classification of IP Telephony Service, Docket No. 29016 (filed Oct. 31, 2003) at 6 (stating that “to meet the APSC’s goals of ensuring affordable local service and an expansion of rural broadband deployment, the APSC must either maintain [the] existing inter-carrier compensation system or replace it with another funding mechanism.”)

¹⁸ To the extent that broadband Internet access is a competitive activity, the Petitioners’ proposal would also appear to violate 47 U.S.C. § 254(k), which states unequivocally (and without regard to inter- or intrastate status) that “a telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition.” Since traditional access service provided in connection with reaching rural residential customers is plainly not a competitive service, this statute would appear to ban precisely the Petitioners’ proposed use of the access revenues they seek to extract from VoIP providers.

3. An Informal VoIP Workshop Would Be Beneficial

Finally, ACTA concurs with MCI's suggestion that it would be productive to hold workshops with industry participants and regulatory personnel to discuss different VoIP arrangements and the regulatory issues they raise.¹⁹ Aside from providing an opportunity for all participants to better understand the concerns of the others, it may be possible, on some issues at least, to find some common ground regarding how to proceed—or not proceed—from a regulatory perspective. ACTA would be pleased to participate in such a workshop.

However, ACTA believes that the best course would be for the Commission *not* to take any formal action regarding VoIP offerings at this time. Instead, services should be deployed and given the chance to develop before any formal regulatory rulings are issued. In the words of the National Research Council, “[t]he inconsistencies between the [network] architecture assumed in the current regulatory regime governing the PSTN and the architectures for IP telephony suggest that PSTN regulation should not be transferred . . . because the new services appear to constitute telecommunications.”²⁰ The Commission should not rush to put a “stake in the ground” as to regulatory classification or any other issue. Instead, the Commission should give the affected technologies and markets time to stabilize and mature before making any long-term judgments regarding appropriate regulatory policy.

¹⁹ Comments of MCI, at 7.

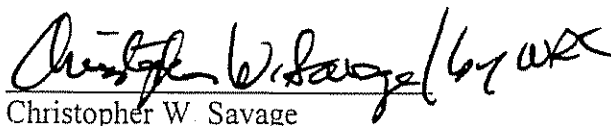
²⁰ National Research Council, Computer Science and Telecommunications Board, *THE INTERNET'S COMING OF AGE*, 17 (National Academy Press 2001).

4. Conclusion.

As stated in its initial comments, ACTA urges the Commission to move cautiously with respect to regulation of VoIP arrangements. Most VoIP activity today is interstate in nature, so that decisions by the FCC will significantly affect the regulatory treatment of these arrangements. Moreover, there are many different technical configurations that fall under the rubric of "VoIP," and the different technical configurations could easily result in different conclusions regarding the appropriate regulatory treatment. As a result, as ACTA explained in its initial comments, the Commission should establish a presumption that traditional regulatory obligations do not apply to VoIP arrangements, with a heavy burden of justification on those who would impose any such obligations. Finally, the Commission should resist calls from incumbent LECs—heavily dependent on subsidy-laden access charges—to require payment of such charges from VoIP offerings. Sound regulatory policy should instead seek ways to wean ILECs off their dependency on access charge revenues, not seek ways to expand the reach of such charges

Respectfully submitted,

**The Alabama Cable Telecommunications
Association**

A handwritten signature in black ink, appearing to read "Christopher W. Savage / by CR".

Christopher W. Savage

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Dated: December 2, 2003

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CERTIFICATE OF SERVICE

I, William R. Chandler, certify that a copy of the foregoing Reply Comments of The Alabama Cable Telecommunications Association *In Re Petition For A Declaratory Order Regarding Classification Of IP Telephony Service* Docket 29016 was served upon the persons below by first class, U.S. mail, postage prepaid, on this 2nd day of December, 2003.



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